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Before the
FEDERAL COMMUNICATIONS COMMISSION

MAY - 3 1993

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SUMMARY

Cypress Broadcasting, Inc., licensee of television station KCBA, licensed to Salinas, California, requests reconsideration and reversal of the Commission's decision in this proceeding to the extent the Commission's decision accorded must-carry rights to stations in the home county in which their city of license is located. Cypress seeks reconsideration and reversal for the following reasons.

The Commission's decision is in direct violation of the Cable Act in that it purports to accord KNTV, licensed to San Jose, California, and similarly situated stations, must-carry rights in an entire "county" outside of their Arbitron designated ADI. The Cable Act limits the Commission's ability to accord stations must carry-rights only to additional "communities" outside of their ADIs.

Further, while the Cable Act does allow the Commission to accord stations must-carry rights in additional communities outside of their markets, the Cable Act requires that such Commission action must be based upon a full factual record, the requirements of which are specifically set forth in the Cable Act. The Commission had no such record evidence to support its decision to afford KNTV must-carry rights outside of its ADI.

While the Cable Act precludes the Commission from adding counties to the ADI of any particular station in the manner attempted by the Commission, the Cable Act does not preclude the

Commission from initiating a rulemaking proceeding to add a county to the definition of a market.

In addition to being contrary to the Cable Act, the Commission's decision also violates the requirements of procedural due process in that Cypress and the general public were never given notice that the Commission might adopt the home county exception to the must-carry rules and were not given an opportunity to be heard on that exception.

The Commission's decision also is contrary to the public interest in that it exacerbates an existing imbalance in market power in the Salinas-Monterey market.

The Commission's decision will make this competitive imbalance even more pronounced by allowing KNTV must-carry rights in both the Salinas-Monterey market and a significant portion of the San Francisco-Oakland-San Jose market. The public interest would not be served by subjecting the small market stations in Salinas-Monterey to the additional market power which was given to KNTV in the Commission's decision.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAY - 3 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of the Cable Television)	MM Docket No. 92-259
Consumer Protection and Competition)	
Act of 1992)	
)	
Broadcast Signal Carriage Issues)	
Reexamination of the Effective)	
Competition Standard for the)	MM Docket No. 90-4
Regulation of Cable Television)	
Basic Service Rates)	
)	
Request by TV 14, Inc.)	
to Amend Section 76.51 of the)	MM Docket No. 92-295
Commission's Rules to Include)	RM-8016
Rome, Georgia, in the Atlanta,)	
Georgia, Television Market)	

To: The Commission

PETITION FOR RECONSIDERATION

Cypress Broadcasting, Inc. ("Cypress"), licensee of television station KCBA, Channel 35, licensed to Salinas, California, hereby petitions for reconsideration of the Commission's Report and Order in the above-captioned proceeding. Specifically, Cypress requests reconsideration of that portion of the Commission's Report and Order which ruled that a television station will be considered a must-carry station in its home county, even if that station is assigned to an ADI different from that of its home county. Report and Order, MM Docket No. 92-259 et. al., FCC-144, released March 29, 1993 at para. 39.

Cypress seeks reconsideration of the Commission's decision on the grounds that the decision is contrary to the express

requirements of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act"). In addition, the Commission failed to give adequate notice that it might adopt this exception to the statutorily required must-carry rules. Cypress also seeks reconsideration because the Commission's decision is not in the public interest in that it will provide KNTV, a San Jose television station, an increase in its already unfair competitive advantage over Salinas-Monterey stations.

In support of its Petition, Cypress submits the following:

I. THE COMMISSION'S REPORT AND ORDER

1. In its Report and Order, the Commission adopted rules to implement a portion of the Cable Act. Specifically, the Commission's Report and Order adopted rules implementing the Cable Act's broadcast signal carriage and retransmission consent rules. Among the Comments considered by the Commission in this proceeding were Comments filed by Granite Broadcasting Corporation ("Granite") on behalf of its television station, KNTV, Channel 11, an ABC affiliate licensed to San Jose, California. In its Comments, Granite correctly stated that KNTV is licensed to San Jose and that San Jose is part of the San Francisco-Oakland-San Jose Arbitron ADI. Granite Comments dated January 4, 1993 at 8-9. Granite added that Arbitron lists KNTV as a part of the Salinas-Monterey ADI. Granite Comments at 9. Granite then asserted that, because KNTV is listed by Arbitron as being in the Salinas-Monterey ADI, KNTV should receive special treatment under the cable must-carry

regulations adopted by the FCC in the above-captioned Report and Order. Granite Comments at 9.

2. Based upon this situation described by Granite, the Commission ruled in its Report and Order that:

[E]ach television station will be considered local in those counties listed in the same ADI to which it is assigned. We will make one exception, however: Each station also will be considered a must-carry station in its home county, even if that station is assigned to an ADI different from that of its home county.

Report and Order at para. 39 (emphasis added).

3. The Commission added in a footnote that:

We note the case of KNTV, San Jose, which is assigned to the Salinas-Monterey ADI, even though its home county, Santa Clara, is considered part of the San Francisco ADI.

Id. at para. 39, n. 108.

4. As Cypress shall explain below, the Commission's decision to accord KNTV this special treatment is not permitted under the Cable Act, denied Cypress notice and an opportunity to be heard and is not in the public interest.

II. THE COMMISSION'S DECISION IS CONTRARY TO THE EXPRESS LANGUAGE OF THE CABLE ACT

5. The Cable Act sets forth very specific requirements with respect to the must-carry rights which the Commission is to accord television stations. At Section 614(a) the Cable Act provides:

Each cable operator shall carry on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section.

47 U.S.C. Section 614(a).

6. At Section 614(h)(1)(A), the Cable Act defines "local commercial television station" as follows:

In General -- For purposes of this section, the term "local commercial television station" means any full power television broadcast station,... licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same television market as the cable system.

47 U.S.C. Section 614(h)(1)(A).

7. The Cable Act in Section 614(h)(1)(C)(i) specifies exactly how a station's television market is to be determined:

For purposes of this section, a broadcast station's market shall be determined in the manner provided for in Section 73.3555(d)(3)(i) of title 47, Code of Federal Regulations, as in effect on May 1, 1991....

47 U.S.C. Section 614(h)(1)(C)(i).

8. As the Commission explains in its Report and Order, Section 73.3555(d)(3)(i) has been renumbered as Section 73.3555(e)(3)(i). Report and Order at para. 37, n.100. Section 73.3555(e)(3)(1) of the Commission's Rules defines a broadcasting station's market as its Arbitron ADI. As recognized by Granite and the Commission, KNTV is treated by Arbitron as being a part of the Salinas-Monterey ADI. Therefore, under the clear language of the Cable Act, KNTV was accorded no must-carry rights in any location outside of the Salinas-Monterey ADI.

9. However, the Cable Act accounted for the possibility that there may be situations where a particular station may be able to demonstrate that it should be accorded must-carry rights outside of its ADI. For such unique situations the Cable Act provides the following exclusive remedy:

[F]ollowing a written request, the Commission may, with respect to a particular television broadcast station, include additional communities within its television market to better effectuate the purposes of this section. In considering such requests, the Commission may determine that particular communities are part of more than one television market.

47 U.S.C. Section 614 (h)(1)(c)(i) (emphasis added).

10. The Cable Act therefore clearly limits the Commission's ability to grant a station must-carry rights outside of its ADI. In such circumstances, the Cable Act allows the Commission to accord such station must-carry rights in additional "communities" outside of its ADI. The Commission's decision to accord KNTV and other television stations must-carry rights in a "county" outside of their ADIs is not permitted by the Cable Act and is in direct violation of the Cable Act.

11. That the Cable Act does not include "counties" in the definition of "communities" is clear from the Commission's rules and precedent. The Commission's cable television rules are very clear in distinguishing between "communities" and "counties" for purposes of television rights. Section 76.54(a) of the Commission's Rules, which relates to stations or cable systems seeking to demonstrate that a station is significantly viewed, makes clear distinctions between "counties" and "communities." That section specifically provides that "signals which are significantly viewed in a county" are "deemed to be significantly viewed within all communities within the county." 47 C.F.R. Section 76.54(a).

12. Section 76.54(a) clearly contemplates that a "community" and a "county" are distinct entities for purposes of the Commission's cable television rules. This distinction goes back at least to the adoption of the Commission's significantly viewed rules. See Cable Television Report and Order, 36 FCC 2d 143, 24 RR 2d 1501 (1972). On several occasions since 1972 the Commission has had occasion to explain its reasons for distinguishing between "counties" and "communities" for purposes of implementing its significantly viewed rules. In Desert Empire Television Corp. 7

14. Thus, the Commission exceeded its statutory authority under the Cable Act by adopting a rule exception which gives must-carry rights to television stations in counties outside of their ADIs. Having exceeded its statutory authority, the Commission must reconsider and reverse its decision according some stations must-carry rights in counties outside of their ADI's.

(IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.

17. Prior to issuing its Report and Order in this proceeding, the Commission had received no request from Granite, which complied with these four statutory requirements. Granite's Comments failed to address the following specific issues:

18. First, Granite failed to address whether other stations located in the same area have been historically carried on the cable system or systems within the affected community. Section 614(h)(1)(C)(ii)(I). Had Granite presented evidence on this matter it would have been obligated to advise the Commission that other stations in the Salinas-Monterey ADI -- those stations licensed to Salinas and Monterey -- are not carried on most of the cable systems outside of its ADI on which KVMY seeks to be carried.

19. Second, the Cable Act requires Granite to present evidence on whether any other station, that is eligible to be carried by a cable system in the affected community as a must-carry signal, provides "news coverage of issues of concern to the affected community or provides carriage or coverage of sporting and other events of interest to the affected community." Section 614(h)(1)(C)(ii)(II). Again, Granite presented no such evidence, and the Commission had no record upon which it could make the finding the Cable Act requires.

20. Third, the Cable Act requires Granite to present "evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community." Section 614(h)(1)(C)(ii)(IV). The Cable Act does not specify precisely the information the Commission must require to meet the evidentiary burden imposed by Section 614(h)(1)(C)(ii)(IV). However, the Commission already has in place procedures with which stations must comply in order to demonstrate that they are significantly viewed in a community. Section 76.54 of the Commission's Rules sets forth the information to be provided and the methodology to be used in providing such a study. Granite has not presented the information and studies required by Section 76.54, and the Commission has not specified that any other procedure is permissible as a means for meeting the requirements of the Cable Act. Given the similarities between the relief sought here by Granite and the relief sought by parties utilizing the Commission's significantly viewed rules, a showing similar to that

called for by those rules would appear to be appropriate for providing the Commission the evidence required by the Cable Act. Thus, Granite's showing on this point is particularly inadequate, and the Commission once again has no evidence to support the finding required by the Act.

IV. THE COMMISSION MAY BY RULEMAKING REDEFINE THE SALINAS-MONTEREY ADI TO INCLUDE SANTA CLARA COUNTY

21. As noted above, in reconsidering its decision to accord stations must-carry rights in communities outside of their ADIs, the Commission may afford KNTV the opportunity to file a request with sufficient evidence to make the statutory showing justifying must-carry rights in additional "communities." Alternatively, if the Commission chooses to add a "county" to the Salinas-Monterey market, it must do so in a manner consistent with the Cable Act and Commission precedent.

22. While the Cable Act precludes the Commission from designating additional counties as part of the Salinas-Monterey market for the sole benefit of KNTV, the Cable Act does not preclude the Commission from using its existing rulemaking procedures to redefine the Salinas-Monterey market to include Santa Clara County in that market. The Commission currently allows parties to petition for addition of counties or communities to the list of markets included in Section 76.51 of the Commission's Rules through the use of Part 1, Subpart C rulemaking procedures. The Cable Act does not preclude the Commission from continuing to utilize this procedure. Indeed, the Act specifically directs the

Commission to revise the list in Section 76.51 as required to implement the provisions of the Cable Act. 47 U.S.C. Section 614(f). By utilizing its existing rulemaking procedures to add Santa Clara County to the Salinas-Monterey ADI, the Commission will accord must-carry rights to all stations in the market in the new county. This will avoid the competitive imbalance the Commission's action in this proceeding would create if it is not reconsidered and reversed.

V. THE COMMISSION DEPRIVED CYPRESS OF ITS DUE PROCESS RIGHTS BY FAILING TO GIVE NOTICE THAT IT MIGHT ADOPT THE HOME COUNTY EXCEPTION

23. An additional ground requiring the reconsideration and reversal of the home county exception to the must-carry rule is that the Commission gave no notice that it might adopt such a home county exception. When the Commission issued its Notice of Proposed Rulemaking ("NPRM") in this proceeding, it stated the following with respect to the options it was considering with respect to possible additions or subtractions of "communities" in the designation of markets for purposes of the must-carry rules:

To better reflect market realities and effectuate the purposes of this Act, Section 614(h)(1)(C) permits the Commission to add communities to or subtract communities from a station's television market following a written request. Furthermore, the Commission may determine that particular communities are part of more than one television market. The 1992 Act does not specify whether such requests are to be made by the broadcast station or cable operator. We ask for comment on a proposal to permit either party to make the request. We also seek comment on the appropriate procedures for the written request for communities to be added to or subtracted from the designated market. We believe it would be preferable to require parties requesting such determinations to file

under the provisions of Section 76.7, procedures for petitions for special relief, rather than the rulemaking procedures set forth in Part 1, Subpart C. We believe that consideration of such requests could be expedited if they were filed as petitions for special relief. Would this process be adequate to afford all interested parties sufficient notice? We request comment on this proposal.

8 FCC Rcd 8055, 8059 (emphasis added).

24. Indeed, the Commission went on at length to discuss what information parties filing requests for addition or subtraction of communities might be required to submit:

The 1992 Act specifies that, when considering such requests, the Commission shall afford particular attention to the value of localism by taking into account such factors as 1) whether the station, or similarly situated stations, have been historically carried on the cable system or systems within such community; 2) whether the station provides coverage or other local service to the community; 3) whether any other station qualified for carriage provides coverage of news or programming of local interest; and 4) the local viewing patterns in both cable and noncable homes in the community. We ask parties to consider whether more specific or additional criteria are needed to implement this provision. In particular, we note that under the 1992 Act's definition of "market" the pool of eligible must-carry stations, in some cases, includes stations located hundreds of miles away from the cable system. Should we consider a specific mileage limit (e.g. 50, 70 or 100 miles) when determining whether a station's market should be modified for must-carry purposes? Should such criteria include a standard relating to a station's over-the-air viewability?

Id.

25. At no point in this extensive discussion in its NPRM did the Commission ever suggest that it would disregard the statutorily mandated market modification mechanism to allow the automatic addition of counties to the market of some stations. Cypress received no notice from the Commission in its NPRM, Granite did not serve Cypress with a copy of its Comments, and Cypress did not have

constructive or actual notice of the Commission's intent to adopt
the home county rule exception. This failure of notice is an

Salinas-Monterey market is ranked 111th. Because KNTV is actually located in the San Francisco-Oakland-San Jose market, this Arbitron designation gives KNTV the best of two worlds. KNTV is able to buy programming at the lower Salinas-Monterey ADI prices, while offering advertisers an audience that is viewed over the air and on cable systems in both the Salinas-Monterey ADI and in the San Francisco-Oakland-San Jose ADI. With this dual ADI positioning, KNTV is able to command advertising rates comparable to those of San Francisco-Oakland-San Jose market stations. The ability to command these higher advertising rates allows KNTV the financial strength to bid more for programming than the actual Salinas-Monterey market stations.

28. KNTV has gained this unfair competitive advantage through a long history which includes an ill-advised decision by the Commission. In 1974, the Commission issued its Report and Order in Re Territorial Exclusivity in Non-network TV Programming, 46 FCC 2d 892, 29 RR 2d 1748 (1974) (Territorial Exclusivity Order). In the Territorial Exclusivity Order, the Commission adopted Section 73.658(m) of its Rules which places limits on the extent to which television stations may bargain with programming suppliers for exclusive broadcast rights in their respective markets. In hyphenated markets such as San Francisco-Oakland-San Jose, stations are allowed by Section 658(m) to obtain exclusive rights against all stations in the communities included in the hyphenated market.

29. The Report and Order adopting Section 73.685(m) was released by the Commission on May 2, 1974 and became effective on

May 10, 1974. In the Territorial Exclusivity Order, the Commission did not grant a request by KNTV that Section 73.685(m) be written so as to exclude San Jose from the hyphenated market provision, i.e., the Commission rejected KNTV's argument that television stations licensed to San Francisco and Oakland should not be able to enforce non-network programming exclusivity against television stations licensed to San Jose. In Re Territorial Exclusivity in Non-network TV Programming, 46 FCC 2d 892, 29 RR 2d 1748, 1753, 1758 (1974), see also Ralph C. Wilson Industries, Inc., 91 FCC 2d 127, 52 RR 2d 253 (1982).

30. Thereafter, KNTV immediately started a stream of legal proceedings involving the application of Section 73.685(m) to KNTV. On December 20, 1974, Gill Industries, Inc., the then-licensee of KNTV, filed a "Request for Interpretive Ruling" with the Commission seeking a waiver of the hyphenated market provisions of Section 73.685(m). In its Request, Gill asserted that it had made a showing justifying a waiver of the hyphenated market provisions of Section 73.685(m). The Commission denied Gill's request for a waiver of Section 73.685(m) for KNTV. Geographical Exclusivity In Non-Network Syndicated Programming, 37 RR 2d 695 (1976).

31. This rejection by the Commission spawned a "Petition for Reconsideration" filed by Gill on July 19, 1976. The Commission denied this Petition in March, 1977. Geographical Exclusivity in Non-Network Syndicated Programming, 40 RR 2d 473 (1977). On November 1, 1977, shortly after the Commission rejected Gill's petition for reconsideration, Gill filed a petition to deny the

license renewal application for KGO(TV) which was and is licensed to San Francisco. Gill based its petition to deny on KGO's inclusion of KNTV within its syndicated programming exclusivity agreements with program suppliers, while KGO was not exercising non-network programming exclusivity against KSBW (licensed to Monterey). American Broadcasting Cos., Inc., 46 RR 2d 1695 (1980).¹

32. The Commission denied the petition to deny, but indicated that Gill had shown facts from which the Commission concluded that it should give further consideration to the argument that KNTV should not be included in the San Francisco-Oakland-San Jose hyphenated market for non-network programming exclusivity purposes. Id. 46 RR 2d at 1699. The Commission noted in particular that, while KSBW (licensed to Monterey) served an area largely identical to that served by KNTV, KGO could not enforce exclusivity against KSBW, because Section 73.685(m) did not allow KGO to assert exclusivity rights against KSBW. While cautioning that it had not prejudged this matter, the Commission concluded that "... we will consider a showing that exclusivity protection is not required and discriminates against KNTV in light of the substantial service within KGO's service area by KSBW and other licensees." Id. Most San Francisco television stations, including KGO, dropped exclusivity against KNTV shortly after the Commission's decision

¹ In 1978 Gill's license was transferred to KNTV, Inc., a subsidiary of Landmark Communications. As noted above, KNTV is now licensed to Granite.

was released. See Ralph C. Wilson Industries, Inc., supra 52 RR 2d at 254.

33. As a result of KNTV's success in this regard, KICU, a station licensed to San Francisco-Oakland, soon began a similar campaign to be treated as a Salinas-Monterey station for territorial programming exclusivity purposes. Thus far KICU's efforts have proven unsuccessful. Ralph C. Wilson Industries, Inc., supra.

34. The pivotal point in the above-described history was the Commission's decision indicating to the other San Francisco-Oakland-San Jose market television stations that the Commission perceived some merit in KNTV's claim that the other stations in that market should not exercise their territorial exclusivity rights against KNTV. It is that determination that is now subjecting KCBA and other Salinas-Monterey television stations to competition for programming from KNTV, a station that in all other respects, except ADI designation, is a San Francisco-Oakland-San Jose market station.

35. Against this backdrop, the Commission's decision to accord KNTV must-carry rights in both the entire Salinas-Monterey market and a significant part of the San Francisco-Oakland-San Jose market will greatly exacerbate an already unfairly tilted competitive situation in the Salinas-Monterey market. For this reason, the Commission's decision is not in the public interest and should be reconsidered.

VII. CONCLUSION

36. Reconsideration is required because the Commission's decision fails to comply with the Cable Act. The Cable Act only permits the Commission to add "communities," not "counties," to its market definitions at the request of a specific station. In

Monterey ADI, with the result benefiting all stations in the Salinas-Monterey ADI.

39. Further, the Commission's decision to extend must-carry rights to KNTV deserves the public interest by providing an even greater competitive advantage to KNTV, a station licensed to San Jose, a community in the 5th Arbitron ADI. As a direct result of the Commission's decision, KNTV will be able to exercise market power to the disadvantage of stations licensed to Salinas-Monterey, the 111th Arbitron ADI. On the other hand, there are important public interest reasons for limiting the market power of this San Jose station from further disadvantaging KCBA and the other stations licensed to the small Salinas-Monterey ADI. By reconsidering and reversing its decision, the Commission will prevent further competitive distortions in the Salinas-Monterey market.

WHEREFORE, Cypress requests that the Commission reconsider and reverse its decision to provide a home county exception to the must-carry rules adopted in this proceeding.

Respectfully submitted,

CYPRESS BROADCASTING COMPANY

By: 

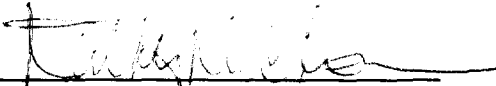
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May 3, 1993

CERTIFICATE OF SERVICE

I, Kathy Nickens, a secretary in the law firm of Rubin, Winston, Diercks, Harris & Cooke, do hereby certify that a copy of the foregoing "PETITION FOR RECONSIDERATION" was served this 3rd day of May, 1993, by first-class postage mail to the following:

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